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No. 94-1811

In The

Supreme Court of the United States

October Term, 1994

ALVIN B. CUTLER and JOYCE P. CUTLER, et ux, et al.,

Petitioners,

v.

PHILLIPS PETROLEUM COMPANY, a foreign corporation,

Respondent.

On Petition For Writ Of Certiorari To The Washington State Supreme Court

PHILLIPS PETROLEUM COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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LOPP

QUESTIONS PRESENTED

1. Whether the petitioners have demonstrated a split in authority amongst the circuit courts of appeal on the issue of the scope and extent of federal preemption under the Employment Retirement Income Security Act of 1974.

2. Whether the issues presented by the petitioners are of sufficient national importance to warrant review by the United States Supreme Court.

PARTIES

ALVIN B. CUTLER, and JOYCE P. CUTLER, a marital community; MARGARET E. CARRIERES and JOHN N. CARRIERES, a marital community; BILL E. DAISS and MARIJOE DAISS, a marital community; LARRY O. GUST, a single person; KENNETH M. JANSEN and MARGARET V. JANSEN, a marital community; MARVIN PAUL and JANICE PAUL, a marital community; RICHARD A. DAVIS and his marital community; FRED LINDBERG and his marital community; JERRY KOONTZ and his marital community; DAVID L. HOFFARTH and his marital community; RICHARD G. ALLEN and his marital community; SUSAN R. HOOVER and ALLEN V. HOOVER, a marital community,

Petitioners,

and

PHILLIPS PETROLEUM COMPANY,[1] a foreign corporation,

Respondent.

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[1] All of Phillips Petroleum Company's subsidiaries are wholly-owned, except PHILLIPS GAS COMPANY, which has issued its own stock.

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I. GROUNDS FOR JURISDICTION

The decision of the Supreme Court for the State of Washington was entered on September 29, 1994, and a timely petition for rehearing was denied on December 13, 1994. The Petition for Writ of Certiorari was filed on March 13, 1995. Jurisdiction of the Court is invoked under 28 U.S.C. § 1257(a).

II. STATEMENT OF THE CASE

Prior to December 1985, petitioners were employees of a subsidiary of respondent Phillips Petroleum Company ("Phillips"). Because of the expenses involved in fighting an attempted hostile takeover, Phillips decided to sell assets in order to reduce its debt. One of those assets was its fertilizer division, by which the petitioners were employed. On December 31, 1985, Phillips consolidated all of its fertilizer business into one subsidiary, American Fertilizer and Chemical Company, and transferred the fertilizer employees, including the petitioners, to the payroll of that subsidiary. On February 28, 1986, Phillips sold its interest in American Fertilizer and Chemical Company to Cepex, Inc. Petitioners were offered and accepted employment with the new owner, Cepex, Inc.

On April 3, 1986, Phillips and certain participating subsidiaries offered a "special separation program" of enhanced retirement and other benefits to their employees who met the requirements of the plan, and who subsequently ended employment during a window period, from April 3, 1986, through July 1, 1986. Several of the petitioners sought to take advantage of this program. Their requests were denied because at the time the "special separation program" was offered, the petitioners were no longer employees of Phillips or its participating subsidiaries. On or about December 26, 1986, each petitioner ended gainful employment with Cepex, Inc.

Thereafter, the petitioners filed a Complaint and then a First Amended Complaint, alleging eight causes of

action seeking monetary damages against Phillips for "frustration of retirement and other benefits due to plaintiffs (petitioners) and wrongfully denied or withheld by defendant Phillips." *See* Appendix ("App."). The petitioners' eight causes of action were: (1) Breach of fiduciary duty and interference with protected rights pursuant to the Employment Retirement Income Security Act of 1974, as amended (ERISA), 29 U.S.C. § 1001, *et seq.* (*See* App. A-7 and A-23); (2) Benefits unlawfully withheld pursuant to the Revised Code of Washington (RCW 49.46.010, 49.52.050, 49.52.070); (*See* App. A-7 and A-20); (3) Age discrimination pursuant to RCW 49.60.010, *et seq.*, and 29 U.S.C. § 621, *et seq.* (*See* App. A-8 and A-24); (4) Negligence (*See* App. A-8 and A-20); (5) Breach of contract, either written, oral, or implied (*See* App. A-9 and A-21); (6) Fraud (*See* App. A-10 and A-22); (7) Outrage (*See* App. A-10 and A-23); and (8) Negligent misrepresentation (*See* App. A-11 and A-22).

Phillips moved to dismiss the petitioners' first, second and fourth through eighth causes of action,[2] arguing that (1) the first cause of action was an ERISA cause of action within the exclusive jurisdiction of the federal courts pursuant to 29 U.S.C. § 1132(e); and that (2) the second, fourth, fifth, sixth, seventh and eighth causes of action were "related to" an employee benefit plan and, therefore, preempted by ERISA, pursuant to 29 U.S.C. § 1144(a).

The trial court held that the petitioners' first cause of action was an ERISA claim within the exclusive jurisdiction of the federal courts, and further, that the second cause of action, a state law claim for employee benefits unlawfully withheld, was "related to" an employee benefit plan and, therefore, preempted by ERISA as a matter

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[2] Phillips also moved to dismiss the petitioners' third cause of action, age discrimination, on different grounds. Phillips, however, did not appeal the denial of its motion with respect to this claim.

of law. As a result, these two claims were dismissed and petitioners did not appeal. *See* Petitioners' App. A-1 to A-16.

The trial court, however, ruled that the petitioners' state law claims for breach of contract, negligence, negligent misrepresentation, outrage and fraud were not "related to" an employee benefit plan; therefore were not barred by ERISA, and denied Phillips' motion to dismiss these claims.

Phillips then filed a motion for discretionary review with the Washington State Court of Appeals, the state intermediate appellate court, seeking to have the appellate court review the trial court's refusal to dismiss the petitioners' remaining state law causes. The Court of Appeals accepted discretionary review, the matter was heard, and the decision of the trial court was affirmed. Petitioners' App. A-17 to A-40.

Phillips next petitioned the Washington State Supreme Court, requesting that they accept discretionary review of this matter. Again, the Washington State Supreme Court granted discretionary review, the matter was heard and the Washington State Supreme Court reversed the decisions of the court of appeals and the trial court, finding that petitioners' remaining state law causes of action were, in fact, "related to" an employee benefit plan, and thus, were preempted by ERISA. *See* Petitioners' App. A-41 to A-80.

III. SUMMARY OF ARGUMENT

Petitioners' Petition for Writ of Certiorari should be denied. The analysis of the Supreme Court for the State of Washington in dismissing the petitioners' state law causes of action is correct and consistent with ERISA preemption law.

An insightful review of the gravamen of the petitioners' Complaint and Amended Complaint establishes conclusively that their state law claims "relate to" and, therefore, are preempted by ERISA. The petitioners

unsuccessfully attempt to overcome this clear fact by citing several cases which purportedly are inconsistent with the decision rendered by the Supreme Court for the State of Washington in this case. The petitioners' argument, however, is illusory. A critical review of the cases cited by the petitioners establishes that these cases are analytically flawed or factually distinguishable. In fact, decisions of the Court and the circuit courts of appeals based upon facts similar to those presented here hold that such state law claims "relate to" and are, therefore, preempted by ERISA.

The Petition for Writ of Certiorari should, therefore, be denied.

IV. ARGUMENT

GROUNDS WHY CERTIORARI SHOULD BE DENIED.

A. The Petitioners' Complaint And Amended Complaint Establish That Their State Law Causes Of Action "Relate To" An Employee Benefit Plan.

There is a reason the petitioners quote in their petition only a sentence and a half from their entire thirteen-page complaint. Their own complaint does not support their claim that their state law claims are unrelated to and, therefore, not preempted by ERISA. The petitioners are merely trying to distance themselves from their own allegations.

Claiming that their action is and has always been a "wrongful termination" action unrelated to ERISA (*See* Petition, p. 22), petitioners simply ignore the facts and their own pleadings. The petitioners' Complaint and subsequent Amended Complaint *explicitly assert* causes of action for breach of fiduciary duty under ERISA (29 U.S.C. § 1109) and interference with attainment of ERISA benefits (29 U.S.C. § 1140). *See* App. A-7 and A-23. Ignored is the fact petitioners' first and primary damage claim is for "frustration of retirement and other benefits

due plaintiffs and wrongfully denied or withheld by defendant Phillips." *See* App. A-11 and A-25.

Petitioners' Complaint and Amended Complaint speak for themselves, and establish conclusively that the petitioners' state law causes of action are preempted by ERISA. This undeniable fact was recognized by the Washington Supreme Court in its decision in this matter. *Cutler v. Phillips Petroleum Co.*, 124 Wash.2d 749, 881 P.2d 216 (1994).

1. Purpose And Scope Of ERISA.

ERISA is a comprehensive remedial statute, the purpose of which is to protect the interests of employees and welfare plans (*Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983)), and to protect employers from conflicting and inconsistent state laws and regulations. *See FMC Corp. v. Holliday*, 498 U.S. 52, 60 (1990). The former purpose is achieved through a comprehensive system of reporting, disclosure, funding and the establishment of fiduciary duty and claims procedures.

The latter purpose is achieved through federal preemption of state law, including, "decisions, rules, regulations or other State actions having the effect of law, of any State." 29 U.S.C. § 1144(c)(1); *See, FMC Corp. v. Holliday, supra* at 60.

To this end, ERISA has established federal causes of action, supplanting and replacing preempted state law for the recovery of benefits due under pension and welfare plans (29 U.S.C. § 1132), for breach of fiduciary duty (29 U.S.C. § 1109), and for interference with protected rights (29 U.S.C. § 1140).

The corresponding ERISA preemption clause is quite broad. ERISA "shall supersede any and all State laws insofar as they may now or hereafter *relate to* any

employee benefit plan . . . " (Emphasis Added). 29 U.S.C. § 1144(a). Not only is the ERISA preemption clause expansive on its face, it has also been interpreted by the Court in this manner.

> The pre-emption clause is conspicuous for its breadth. (Cite Omitted) Its "deliberately expansive" language was "designed to . . . establish pension plan regulation as exclusively a federal concern." (Cites Omitted) The key to § 514(a) is found in the words "related to." Congress used those words in their broad sense, rejecting more limited pre-emption language that would have made the clause "applicable only to state laws relating to the specific subjects covered by ERISA." (Cite Omitted)
>
> . . .
>
> "A law relates to an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." (Cite Omitted) Under this "broad common sense meaning," a state law may "relate to" a benefit plan, and thereby be pre-empted, even if the law is not specifically designed to affect such plans, or the effect is only indirect. (Cite Omitted) Pre-emption is also not precluded simply because a state law is consistent with ERISA's substantive requirements. (Cite Omitted)

Ingersoll-Rand v. McClendon, 498 U.S. 133, 138-39 (1990).

In this vein, to the extent state law causes of action for fraud, misrepresentation, breach of contract, negligence, and infliction of emotional distress "relate to" an ERISA plan within this expansive definition of the phrase, said causes of action are preempted. *Ingersoll-Rand, supra* at 136. ("McClendon sought compensatory and punitive damages under various [state law] tort and contract theories"); *Olson v. General Dynamics Corp.*, 960 F.2d 1418 (9th Cir. 1991) (state law fraud and negligent misrepresentation claims preempted); *Tingey v. Pixley-*

Richards West, Inc., 953 F.2d 1124 (9th Cir. 1992) (ten state law causes of action preempted); *Howard v. Parisian, Inc.*, 807 F.2d 1560 (11th Cir. 1987) (state law bad faith and emotional distress claims preempted).

The preemptive effect of ERISA applies whether or not a plaintiff explicitly asserts an ERISA cause of action. *Ingersoll-Rand, supra* at 136. And in this regard, the Court should not look to a mere sentence and a half quoted by the petitioners, but should look to the four corners of the complaint and beyond to determine, pursuant to the well-pled complaint rule, whether the petitioners have asserted claims "related to" an ERISA plan. *See, e.g., Olguin v. Inspiration Consolidated Copper Co.*, 740 F.2d 1468 (9th Cir. 1984).

2. The Gravamen Of Petitioners' Complaint Establishes That Their State Law Claims "Relate To" And Are, Therefore, Preempted By ERISA.

In their attempt to avoid the clear application of ERISA preemption, the petitioners, in a chameleon-like-fashion, have now and in the past characterized their complaint in many different ways. Their argument, however, is betrayed by the very fact they do not cite to either of their complaints, nor are they apparently willing to attach their complaints as part of their appendix in support of their petition. Specifically, if a plaintiff had a claim fully unrelated to ERISA, one would expect that the first pleading he or she would present in his or her own defense is his or her complaint, the summary statement of the cause of action. Petitioners did not, in this case, because their complaint does nothing but undermine their argument. An objective review of both petitioners' Complaint and Amended Complaint establishes unequivocally that their action is "related to" an ERISA plan and, therefore, their state law causes of action are preempted.

Petitioners in both of their complaints assert that Phillips represented that it had contracted with Cepex,

Inc., for their protection so that benefits that had accrued while they were with Phillips would remain intact for a minimum of two years. *See* App. A-4 and A-16. Petitioners further allege that Phillips represented:

> . . . that plaintiffs' (petitioners') retirement benefits as earned would stay with defendant Phillips; and that plaintiffs (petitioners) would be eligible for early retirement benefits from defendant Phillips after the sale of the fertilizer assets to Cepex.

See App. A-4 and A-17. The complaints continue by claiming:

> On April 3, 1986, defendant Phillips announced a "special separation program," including enhanced retirement benefits, severance pay, outplacement, and housing assistance, and a "certain thrift plan," including medical and life insurance benefits.

See App. A-5 and A-18.

> Based upon the previously-mentioned assurances given to plaintiffs (petitioners) by defendant Phillips, plaintiffs (petitioners) Cutler, Carrieres, Daiss, Gust, and Paul, attempted to take advantage of the "special separation program" of April 3, 1986. Plaintiffs (petitioners) believed they were qualified to take advantage of that program due to the aforementioned representation and assurances. Those requests were denied by defendant Phillips. Plaintiffs (petitioners) were told that they were no longer Phillips "employees" on April 3, 1986.

See App. A-6 and A-18.

> Any attempts by plaintiffs (petitioners) to stay with Phillips had been denied, and they were vigorously encouraged by defendant to follow the transfer of assets to Cepex, while employees of higher rank with Phillips' fertilizer division had been allowed to stay long enough to take

> advantage of the "special separation program." These higher ranking employees knew of the special program or its possibility prior to March 1, 1986, yet failed to disclose its existence to any of the plaintiffs (petitioners).

See App. A-6 and A-19. Alleging they were subsequently laid off by Cepex, Inc., petitioners finally asserted as the motive for Phillips' actions:

> By offering the early retirement program, selling employees as assets, and by refusing to allow employees, including certain of the plaintiffs (petitioners) an opportunity to take advantage of the early retirement program, defendant Phillips received a windfall from its retirement or pension trust, which was thereafter used to reduce defendant Phillips' outstanding debt and to fight any hostile takeover bid.

See App. A-6 and A-19.

Petitioners affirmatively incorporated each of these allegations in all seven causes of action and sought damages for "frustration of retirement and other benefits due to plaintiffs (petitioners) and wrongfully denied or withheld by defendant Phillips." *See* App. A-11 and A-25.

Phillips strongly denies these allegations, except for the statements regarding the existence and nature of the special separation program. However, in light of these direct and pointed allegations concerning interference with the attainment of benefits, it is clear that the petitioners' claim in their original and First Amended Complaints are "related to" an employee benefit plan within the meaning of 29 U.S.C. § 1144(a).

The clearest evidence that petitioners' claims "relate to" an ERISA plan is the fact that their first cause of action, seventh in their First Amended Complaint, specifically alleges ERISA 29 U.S.C. § 1109 and § 1140 causes of action. *See* App. A-7 and A-23. In their petition, however, the petitioners attempt to purvey the disingenuous impression that from the very beginning they

had only ever sought to bring a "wrongful termination" claim and never contemplated the impact of ERISA.

Petitioners cannot avoid the ERISA controlled gravamen of both their original and First Amended Complaints, when read as a whole. The Washington State Supreme Court rendered its decision based on the gravamen of these complaints when it determined that the petitioners' state law causes of action were preempted by ERISA. Petitioners cannot change this fact by claiming that their complaint really is something other than what they twice stated it to be.

B. Contrary To Plaintiff's Contention, The Washington State Supreme Court Decision In This Case Is Consistent With The Court's Holdings And Other Recent Circuit Court Of Appeals' Decisions.

In an attempt to give the impression that the Washington State Supreme Court decision in *Cutler v. Phillips Petroleum Co., supra,* is contrary to the holdings of the Court and "the vast body of federal case law interpreting ERISA preemption" (Petition, p. 25), the petitioners cite several lower court and state court cases. This is a false impression, however. These cases and their holdings are based on modes of analysis and interpretation of ERISA that have subsequently been rejected by the Court and the various courts of appeals or are clearly factually distinguishable.

1. A Claim Under ERISA Need Not Directly Concern Plan Administration or Proper Processing of Benefits.

Prior to the Court's decision in *Ingersoll Rand v. McClendon, supra,* there was a line of case law that held that for a claim to "relate to" ERISA, it must directly involve plan administration or improper processing of benefits. This analysis arose out of a misinterpretation of

the Court's opinion in *Fort Halifax Packing Company, Inc. v. Coyne*, 482 U.S. 1 (1987). In *Ingersoll-Rand v. McClendon, supra*, the plaintiff, McClendon, made this same argument and claimed that because his claim focused on his employer's decision to terminate his employment, his claim was not preempted. *Ibid.* at 141. Explaining the flaw in McClendon's argument, the Court stated that if only causes of action relating to plan administration and benefit processing were preempted, plan sponsors would be burdened by having to comply with conflicting substantive standards "requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction," which is exactly what 29 U.S.C. § 1144(a) seeks to foreclose. *Ibid.* at 142.

This flawed analysis was also noted by the Ninth Circuit Court of Appeals in *Olson v. General Dynamics Corp., supra*, stating:

> As to the argument that Olson's allegations do not "relate to" the administration of an employee benefit plan, the short answer is that neither the statute nor the Supreme Court's pronouncements upon it have suggested such a requirement. Surely, a claim can be said to have a "connection with" or make "reference to" a plan without it concerning the technical aspects of the plan's administration.

Ibid. at 1421.

A review of *Cuoco v. Nynex, Inc.*, 722 F.Supp. 884 (D.Mass. 1989); *Schlenz v. United Airlines, Inc.*, 678 F.Supp. 230 (N.D.Cal. 1980); *Bricker v. Maytag Co.*, 450 N.W.2d 839 (Iowa 1990); *Miller v. Lay Trucking Co., Inc.*, 606 F.Supp. 1326 (N.D.Ind. 1985); *Teper v. Park West Galleries, Inc.*, 431 Mich. 202, 427 N.W.2d 535 (1988); *Pizlo v. Bethlehem Steel Corp.*, 884 F.2d 116 (4th Cir. 1989); *Martin v. Pate*, 749 F.Supp. 242 (S.D.Ala. 1990); and *Bell v. Amcast Indus. Corp.*, 607 F.Supp. 486 (S.D.Ohio 1985), cited by the petitioners, establishes that these cases are based on a very narrow and strict interpretation of ERISA that only claims

directly "related to" ERISA administration or improper handling of benefits are preempted by ERISA. As explained above, this analysis has been rejected as erroneous.

2. One Need Not Be A Plan Participant Or Beneficiary To Have Standing Under ERISA.

The petitioners argue that in order to have standing to sue under ERISA they must be a plan participant or beneficiary and since they are neither, they lack standing to sue under ERISA. The argument continues, if they cannot sue under ERISA they cannot have a claim "related to" ERISA, therefore, ERISA preemption is inapplicable in this case. An example of this method of analysis is *Stanton v. Gulf Oil Corp.*, 792 F.2d 431 (4th Cir. 1986).

This method of analysis has been rejected in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), and subsequent court of appeals progeny. The Court states:

> In our view, the term "participant" is naturally read to mean either "employee in, or reasonably expected to be in, currently covered employment," (Cite Omitted) or former employees who "have . . . a reasonable expectation of returning to covered employment" or *who have "a colorable claim to vested benefits."* (Cite Omitted) In order to establish that he "may become eligible for benefits," a claimant must have a colorable claim that (1) he will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future. "This view attributes conventional meaning to the statutory language since all employees in covered employment and *former employees with a colorable claim to vested benefits, may become eligible."* (Emphasis Added)

Ibid. at 118-119.

In *Swinney v. General Motors Corp.*, 46 F.3d 512 (6th Cir. 1995), a case very similar to the case at bar, the Sixth

Circuit Court of Appeals elaborated further on the Court's holding in *Bruch*.

In November 1986, General Motors announced that it would gradually close its Fairfield, Ohio stamping plant. As jobs were phased out, employees were placed in a job opportunity program where they received full salary and benefits for performance of nontraditional work, such as community service. While in this program, the employees were given two basic options: they could completely sever their employment relationship with General Motors in exchange for a lump sum payment under a voluntary termination of employment program (VTEP), or they could stay in the jobs program until the plant finally closed and then go on to permanent layoff receiving an assortment of temporary benefits.

In March of 1989, after the plaintiffs had accepted their VTEPs, and eight months after the plant had closed, General Motors again offered their laid-off employees in the jobs program a new "window VTEP." After learning of the additional VTEP, the plaintiffs brought suit under various state law claims such as fraud, negligent misrepresentation and estoppel. The district court dismissed these claims, finding that they were preempted by federal law. On appeal, the same argument as the petitioners have raised here regarding participant status and standing to sue under ERISA was addressed. The sixth circuit, analyzing the Court's analysis in *Bruch*, in the standing context, stated:

> In construing § 1002(7) of ERISA in conjunction with the traditional standing concepts, we, along with a majority of circuits, have developed an exception to the general rule that a person who terminates his rights to belong to a plan cannot be a "participant" in a plan. Specifically, if the employer's breach of fiduciary duty causes the employee to either give up his rights to benefits or to fail to participate in a

> plan, then the employee has standing to challenge that fiduciary's breach. (Cites Omitted) Otherwise, a fiduciary could defeat an employee's standing to bring an ERISA action by duping him into giving up his rights to participate in a plan. ERISA should not be construed to permit the fiduciary to circumvent his ERISA-imposed fiduciary duty in this manner.

Ibid. at 518-19.

In its opinion, the sixth circuit relies on the analysis of the second circuit in *Mullins v. Pfizer*, 23 F.3d 663, 668 (1994), the first circuit in *Vartanian v. Monsanto Corp.*, 14 F.3d 697, 702 (1994), and the fifth circuit in *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209, 1221 (1992), which also hold that if the acts of an employer or fiduciary interferes with one's participant or beneficiary status under ERISA, one nevertheless has standing to sue under ERISA. The sixth circuit concludes:

> We would clearly frustrate Congress's intent "to remove jurisdictional and procedural obstacles," if we held that ERISA preempts the plaintiffs' state law claims and yet denies them standing to pursue a federal claim. (Cite Omitted) We therefore hold that so long as a former employee would have been in a class eligible to become a member of the plan *but for* the fiduciary's alleged breach of duty, he "may become eligible" for benefits under the plan and is therefore a "participant" under § 1002(7) for purposes of standing. (Emphasis Added)

Swinney, supra at 519.

The same analysis applies equally to the petitioners' ERISA claim for interference with attainment of benefits, 29 U.S.C. § 1140. As the Third Circuit Court of Appeals states:

> By its very nature, a § 510 claim will often involve employees who claim that they did not receive benefits because of their employer's

> actions, and thus were denied an opportunity to become "participants" in the benefits. To require that employees have the status of participant where they allege that the employer's acts effectively deprived them of such status would undercut the provision and cannot be intended by Congress.

Saporito v. Combustion Engineering, Inc., 843 F.2d 666, 672 (3rd Cir. 1988) (*vacated and remanded on other grounds*, 489 U.S. 1049 (1989)).

A review of the holdings in *Stanton, supra; Teagardener v. Republic-Franklin, Inc. Pension Plan*, 909 F.2d 947 (6th Cir. 1990); *Freemen v. Jacques Orthopaedic*, 721 F.2d 654 (9th Cir. 1983); *Deller v. Portland General Electric Co.*, 734 F.Supp. 916 (D.Ore. 1990); *Klank v. Sears, Roebuck & Co.*, 735 F.Supp. 260 (N.D.Ill. 1990); and *Yancy v. American Petrofina, Inc.*, 597 F.Supp. 490 (E.D.Tex. 1984), *aff'd* 768 F.2d 707 (5th Cir. 1985); *Morningstar v. Meijer, Inc.*, 662 F.Supp. 555 (E.D.Mich. 1987); and *Gibson v. Wyatt Cafeterias, Inc.*, 782 F.Supp. 331 (E.D.Tex. 1992), cited by petitioners, indicate that these decisions are dependent on their respective court's finding that the claimants were not "plan participants or beneficiaries." These claims appear to predate or ignore the Court's holding in *Bruch, supra*, and recent circuit courts of appeal's decisions that hold that one need only have a "colorable (but for) claim to benefits or ERISA entitlement."

3. The Other Cases Cited By Petitioners Are Distinguishable On The Facts Or The Nature Of The Claims Raised.

The petitioners also cite cases where the courts in question were correct in at least the result. However, these cases are clearly distinguishable from the instant case and fall into two categories: (1) claims alleging forms of discrimination; and (2) claims that would exist regardless of ERISA benefits. In either case, ERISA is not implicated.

In this action, the petitioners have alleged age discrimination. This claim is admittedly not "related to" ERISA, even though lost benefits may be a measure of damages. Phillips does not, nor would it contend otherwise. *See, Ethridge v. Harbor House Restaurant*, 861 F.2d 1389 (9th Cir. 1988). It is for this reason that Phillips *never* sought to dismiss petitioners' age discrimination claim on these grounds and this claim is not an issue on appeal.

Nevertheless, the petitioners claim that the following *unlawful discrimination cases* are somehow indistinguishable from their negligence, fraud, negligent misrepresentation, contract and outrage claims: *Lane v. Goren*, 743 F.2d 1337 (9th Cir. 1984) (violation of California Fair Employment and Housing Act); *Tippett v. Old Kent Bank*, 134 F.R.D. 159 (W.D.Mich. 1991) (alleging age discrimination); *Hubbard v. Southwestern Bell Telephone Co.*, 759 F.Supp. 567 (E.D.Mo. 1991) (discrimination based on mental handicap); *Schultz v. National Coalition of Hispanics Mental Health & Human Services Organizations*, 678 F.Supp. 936 (D.D.C. 1988); *Zewe v. Law Firm of Adams & Reese*, 852 F.Supp. 516 (D.C.La. 1993) (retaliatory discharge); *Jorgensen v. Prudential Insurance Co.*, 852 F.Supp. 255 (D.N.J. 1994) (retaliatory discharge); and *Yageman v. Vista Maria*, 767 F.Supp. 144 (E.D.Mich. 1991) (age and sex discrimination).

Clearly, no in-depth explanation or analysis is necessary to distinguish these cases. Had the petitioners claimed that Phillips discriminated against them based on sex, race, disability, religion, ethnic origin or the like, these claims would likewise not be subject to ERISA preemption because clearly there is no ERISA implication. Any ERISA involvement would be a mere consequence of the discriminatory practice, not a material element of the claim itself.

With the exception of the petitioners' still pending age discrimination claim, this is not the nature of the remaining claims of the petitioners in this case. As petitioners admit, their claims all relate to one occurrence

where they allege that Phillips made representations regarding future ERISA benefits, administration and entitlement. Petition, p. 9; *See* App. A-4 and A-16 and 17. It is from these representations regarding ERISA benefits that petitioners' claims not only arise, but center. These claims clearly do not concern or relate to a discriminatory practice against a class of people.[3]

With respect to the other cases cited by the petitioners, in *Jaskilka v. Carpenter Technology Corp.*, 757 F.Supp. 175 (D.C.Conn. 1991), the plaintiff, upon being fired, brought an ERISA claim and a claim for breach of a contract which would have allegedly permitted her to transfer within the company rather than be terminated. The trial court was correct in not dismissing plaintiff's "transfer" contract claim. The only involvement this contract and claim had with ERISA was that ERISA benefits could be used as a measure of damages resulting from the breach. Clearly this "transfer right contract" is not "connected with" an ERISA benefits plan nor does it "refer" thereto. Within the meaning of the phrase "related to," as defined by the Court in *Shaw v. Delta Air Lines, Inc., supra,* and in *Ingersoll-Rand v. McClendon, supra,* a contract relates to ERISA only if a material term of that contract "relates to," i.e., concerns ERISA benefits, administration or entitlement. In *Jaskilka,* this was clearly lacking. However, in this case the principal terms of the petitioners' alleged contract directly concern ERISA benefits.[4]

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[3] Petitioners did assert an ERISA 29 U.S.C. § 1140 claim alleging that Phillips discriminated against them for purposes of interfering with their attainment of ERISA benefits. However, this claim and the petitioners' claim for breach of fiduciary duty under ERISA were dismissed by the trial court for want of jurisdiction and the petitioners did not appeal.

[4] Petitioners' Complaint and First Amended Complaint allege that Phillips represented to them that all benefits obtained while under Phillips' employment would remain "intact without reduction for a minimum of two years after the

It is clear from the petitioners' complaint that ERISA and ERISA benefits are a major part of their breach of contract claim, and as such, is distinguishable from the *Jaskilka* case where the contract had no relationship to ERISA.

Likewise, in *Hartle v. Packard Electric*, 877 F.2d 354 (5th Cir. 1989), the Fifth Circuit Court of Appeals describes the plaintiff's claim as follows:

> Rather, Hartle asserts that as a matter of Mississippi law, his participation in various phases of GM's employment benefit plan has changed his at-will employment status with Packard to one which conferred tenure.

Ibid. at 356. Hence, Hartle claimed that his ERISA participation turned his employment status from one of being at-will to a contractual employee under Mississippi law. The material issue was not ERISA application but whether Hartle had an employment contract and whether that employment contract was breached. The court

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date of sale to Cepex without reduction or elimination." *See* App. A-4 and A-16.

> . . . that plaintiffs' (petitioners') retirement benefits as earned would stay with the defendant Phillips; and that plaintiffs (petitioners) would be eligible for early retirement benefits from defendant Phillips after the sale of the fertilizer assets to Cepex.

See App. A-4 and A-17. The petitioners conclude in their third cause of action that:

> The affirmative conduct and actions of defendant Phillips including its meetings with plaintiffs (petitioners) *and assurances regarding benefits given to plaintiffs (petitioners) constituted a valid and enforceable contract in one of the following forms.* . . . (Emphasis Added)

See App. A-9 and A-21. Clearly petitioners are alleging a breach of contract which not only "relates to" ERISA but whose whole purpose concerns ERISA benefits.

explained why this claim did not "relate to" ERISA as follows:

> These claims are only peripherally connected to the concerns addressed by ERISA. None of these connections warrant a finding that the state laws "relates to" a cover plan for purposes of preemption.

Ibid. The court determined that any ERISA involvement was merely incidental to Hartle's real claim that he was a contractual employee. In the case at bar, the issue of ERISA benefits and ERISA application is far from incidental, but is a driving force behind the petitioners' state law claims.

In *Totten v. New York Life*, 682 F.Supp. 731 (D.Conn. 1987), the plaintiff alleged several state law causes of action and breach of an employment contract. The court dismissed all claims except the employment contract claim on the grounds that they were preempted by ERISA. The court explained:

> Thus, since plaintiffs have claimed that those contracts restricted defendant's right to terminate their employment, rather than affect their interest in pension benefits, and since such claims must be taken to be true, defendant has not met its burden of establishing a basis for preemption as to plaintiffs' claims for breach of their employment contracts.

Ibid. at 732. In essence, the trial court found that an employment contract is not related to ERISA if it does not affect one's interest in benefits. In this respect, the court is certainly correct. An employment contract, in and of itself, is not preempted by ERISA. However, petitioners here are not alleging breach of an employment contract, nor are they alleging a breach of a contract disassociated from an ERISA plan. The review of both of petitioners' complaints establishes clearly that their overall gravamen "relates to" ERISA benefits. Further, petitioners' contract

claim specifically refers to a "contract for benefits." *See* App. A-21.

In *Gould, Inc. v. Pension Benefits Guaranty Corp.*, 589 F.Supp. 164 (S.D.N.Y. 1984), Gould, Inc. as guarantor of a pension plan which failed to make the required contributions to an employee pension fund, entered into settlement negotiations with the claimants and their union and agreed to pay a certain amount upon receipt of a release from the union and the individual claimants. Subsequently, the issue of accrued interest arose as a result of the protracted negotiations. The trial court ruled that whether Gould was required to pay interest was a question of intent and a state law contract issue:

> The central factor is the contract negotiated at arms-length by Sonotone, Pindyck, Gould and the Union. Thus, this Court concludes that ERISA does not apply in the instant case because relevant state laws only in the most remote and peripheral manner touch upon pension plans.

Ibid. at 168. In essence, the court recognized that ERISA was only peripherally related, and the central issue involved the terms to which the parties agreed with respect to interest. As noted above, such is not the case here. Petitioners' claims center around ERISA benefits and ERISA application, and these are central terms to the alleged contract. Clearly, the existence of a pension plan is not an ancillary and inconsequential fact, it is the very heart of the case at bar.

In *Forbus v. Sears, Roebuck & Co.*, 30 F.3d 1402 (11th Cir. 1994), the plaintiffs were advised by Sears that it intended to shut down its retail distribution center in Birmingham, Alabama, as of December 31, 1989. The plaintiffs were offered a voluntary retirement program and advised that if they did not accept the plan, they would be terminated as of December 31, 1989, without benefits. Accordingly, each of the plaintiffs voluntarily retired and participated in the program. In January of

1990, plaintiffs learned that their facility had become a "Cross-Dock Center" rather than shut down. Consequently, they requested reinstatement but were denied. The Eleventh Circuit Court of Appeals described the plaintiffs' claims as follows:

> In contrast, the plaintiffs' claims in this case center on Sears' alleged fraud concerning the elimination of the plaintiffs' jobs, not fraud concerning an ERISA plan or any other benefits package. *The plaintiffs have not claimed any fraud as it relates to the amount of pension benefits received, nor have the plaintiffs made any allegation that Sears misrepresented the availability of pension benefits to the plaintiffs.* Simply put, the plaintiffs contend that Sears lied when it informed them that their jobs were being eliminated. (Emphasis Added)

Ibid. at 1406.

In contrast, in this case, the petitioners' complaint specifically alleges:

> The plaintiffs (petitioners) relied upon these actions, representations and assurances with the belief that Cepex would assume all benefit administration due to the plaintiffs (petitioners) from the defendant Phillips; that plaintiffs' (petitioners') retirement benefits as earned would stay with defendant Phillips; and that the plaintiffs (petitioners) would be eligible for early retirement benefits from defendant Phillips after the sale of the fertilizer assets to Cepex.

See App. A-4 and A-17. Further, the petitioners specifically alleged that Phillips represented to them that it would protect each of them by contracting or otherwise agreeing with Cepex concerning their benefits, and assured them that the benefits accrued during their employment with Phillips would remain intact without reduction for a minimum of two years. *See* App. A-4 and A-16. Thus, the material facts, upon which the eleventh

circuit rendered its opinion in *Forbus* that there was no ERISA preemption, distinguishes it from this case. Here, the petitioners explicitly, clearly and unequivocally allege that Phillips made representations regarding the nature, extent and availability of employment benefits on which they relied to their detriment.

Finally, in *Scott v. Gulf Oil Corp.*, 754 F.2d 1499 (9th Cir. 1985), the former employees of an oil refinery brought suit on state law contract and tort grounds arising from Gulf Oil's alleged failure to provide severance pay due them and for Gulf Oil's alleged improper negotiations with the subsequent purchaser of the refinery over the terms of their future employment. The plaintiffs in *Scott* alleged:

> . . . that Gulf, without their consent, negotiated with Thrifty over the terms of plaintiffs' future employment with Thrifty, and that Gulf joined with Thrifty to coerce them into accepting a new employment contract with Thrifty that contained terms less favorable to them than their contract with Gulf. Plaintiffs allege that as a result of such unauthorized negotiations and such coercion, they lost both severance benefits that they had accumulated while working for Gulf, and benefits that they would have accumulated while working for Thrifty. We shall refer to the latter as "prospective benefits."

Ibid. at 1505. The Ninth Circuit Court of Appeals held that to the extent the plaintiffs' claims concerned benefits already accumulated while working for Gulf, such claims were preempted by ERISA. However, insofar as the claim alleges the loss of "prospective benefits," the claim was not preempted.

At first blush it would appear that this case is similar to the case at bar. However, there is one important material fact that distinguishes *Scott* from the instant case. The Ninth Circuit Court of Appeals explains:

> The claim for prospective benefits does not allege the denial of benefits under a benefit plan; rather, it alleges *Gulf's tortious action prevented the existence of such a plan in plaintiffs' employment with Thrifty.* (Emphasis Added)

Ibid. The significance of this fact in regard to the opinion is clearly expressed in *Olson v. General Dynamics, Corp., supra*,[5] a case factually similar to this action. In *Olson*, the plaintiff argued, as petitioners argue in their petition (Petition p. 52), that pursuant to *Scott*, claims for "prospective benefits" are not preempted by ERISA. This argument was flatly rejected by the Ninth Circuit Court of Appeals:

> *Scott* is easily distinguished. Olson argues that it establishes a rule that claims for prospective benefits are not preempted by ERISA. In fact, the only reason that the claim for prospective benefits was held not to be preempted was because the company for which plaintiff-employees worked did not have an employee benefit plan. After noting that a claim cannot "relate to" a plan that does not exist, we allowed the employees to proceed with their tort claim because it was based on the conduct which led to the non-existence of such a plan. *Scott*, 754 at 1505-06.

Olson, supra at 1421. Like *Olson*, this is not a case where tortious actions prevented the existence of an ERISA plan with a subsequent employer. This is a claim that alleges that acts by Phillips prevented the petitioners from receiving additional benefits from Phillips that they should have otherwise received.

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[5] The Fifth Circuit Court of Appeals is also strongly critical of the *Scott* decision and questions its continuing validity in light of more recent United States Supreme Court decisions. *See Lee v. E.I. Dupont*, 894 F.2d 755 (5th Cir. 1990).

The impressive list of cases petitioners cite in serial fashion in an attempt to create the impression that the Washington State Supreme Court decision in this case is somehow contrary to the "vast body of federal case law," in reality is illusory. These cases do not withstand rigorous analysis and, as demonstrated below, the Washington State Supreme Court's decision in this case is, in fact, consistent with established ERISA preemption law.

C. Decisions In Similar Cases Establish That The Washington State Supreme Court's Decision In This Case Is Consistent With ERISA Preemption Law.

The crux of the petitioners' claim for damages in this case centers on their contentions that Phillips (1) allegedly induced them to accept employment with a purchasing company for the purpose of preventing their attainment of benefits, (2) refused them transfer into other areas of the company when the fertilizer business was sold, and (3) refused to allow them to participate in a "special separation program" while permitting more senior employees to do so. This was allegedly done so that Phillips would receive a windfall profit to their pension plan by preventing the petitioners from obtaining plan benefits. *See* App. A-6 and A-19. This is, in essence, the very same claim raised by the plaintiff in *Ingersoll-Rand v. McClendon, supra.*

In *Ingersoll-Rand*, the plaintiff was terminated when his employer claimed external economic factors mandated a work force reduction. McClendon's termination came four months prior to the vesting of his retirement and pension benefits, at which time his employer would have had to contribute to his pension fund. McClendon sued for beach of contract, breach of the duty of good faith and fair dealing, and wrongful discharge to avoid contributions to a pension fund, and to avoid paying commissions on a sale. The Texas Supreme Court reversed summary judgment for the employer, holding that McClendon stated a claim which

provided a public policy exception to employment at-will and remanded the case for trial. *McClendon v. Ingersoll-Rand*, 779 S.W.2d 69 (Tex. 1989). The Court reversed, stating that under an explicit or implicit analysis, McClendon's state law cause of action would be pre-empted. *Ingersoll-Rand, supra* at 138. The Court held that not only was McClendon's claim preempted because of its relationship to a pension plan, but also because it alleged that he was terminated to prevent him from obtaining plan benefits, a "prototypical" violation of 29 U.S.C. § 1140. *Ibid.* at 143. This is the very same "interference with attainment of benefits" claim that the petitioners make in this case. *See* App. A-7, ¶ XV and A-23, ¶ XXIII.

Finally, the Court addressed the Texas Supreme Court's attempt to distinguish the case on the grounds that McClendon claimed he was not attempting to obtain "pension benefits."

> Not only is § 502(a) the exclusive remedy for vindicating § 510-protected rights, but there is no basis in § 502(a)'s language for limiting ERISA actions to only those which seek "pension benefits". It is clear that the relief requested here is well within the power of federal courts to provide. Consequently, it is no answer to a pre-emption argument that a particular plaintiff is not seeking recovery of pension benefits.

Ibid. at 145. The fact that the petitioners claim that they are not seeking pension benefits, only compensation for loss of future earnings, mental anguish, etc. makes no difference. Their state law claims are preempted by ERISA.

Likewise, the petitioners' claim and the facts of this case are essentially the same as those in *Sanson v. General Motors Corp.*, 966 F.2d 618 (11th Cir. 1992). In the *Sanson* case, plaintiff alleged that General Motors fraudulently represented to him that benefits under a special retirement program would not be offered to employees at the

plant where the plaintiff worked. Relying upon these representations, the plaintiff voluntarily retired under standard provisions of General Motors' early retirement program. The plaintiff claimed, as the petitioners claim here, but for the representations, he would have continued employment with General Motors. Shortly after Sanson retired, General Motors offered a special program for certain eligible employees at Sanson's former plant. Sanson immediately contacted General Motors and demanded that his retirement benefits be increased to the level that the special program provided. General Motors denied his request. Sanson then filed suit seeking benefits, compensation and punitive damages pursuant to state law fraud and negligent misrepresentation theories.

General Motors moved for summary judgment, which was initially denied by the district court. Thereafter, the Court rendered its decision in *Ingersoll-Rand v. McClendon, supra,* and as a result thereof, the district court reversed its prior ruling.

On appeal to the Eleventh Circuit Court of Appeals, Sanson argued, as the petitioners argue in this case, that his claim was "too tenuous to be characterized fairly as 'relating to' an employee benefit plan." *Sanson v. General Motors, supra* at 620. As in this case, Sanson claimed that the purported misrepresentation by General Motors was made with the objective of achieving a 25% reduction in salaried employees without the added expense associated with having to offer a special retirement program. Thus, the "measure of damages sought" would be against General Motors and not against a pension plan. The court of appeals upheld the district court's dismissal of Sanson's state law claims, stating:

> Based on the Supreme Court's interpretation and application of ERISA in *McClendon*, the district court properly applied *McClendon* to hold that federal law preempts Sanson's state law claims. The existence of a pension plan subject to ERISA is a critical factor in both cases. It was

> critical in establishing liability under the state's wrongful discharge law in *McClendon*. In this case, the misrepresentations relate to Sanson's retirement benefits available under GM's special retirement plan. The measure of damages would be the amount of benefits Sanson would have received under the retirement plan. Such a determination of damages demonstrates the relationship between the lawsuit and the special retirement plan.

Ibid. at 621.

The facts in *Olson v. General Dynamics Corp., supra*, are also essentially the same as those presented here, where the Ninth Circuit Court of Appeals affirmed the dismissal of a former employee's state law claims. The plaintiff, Olson, was an employee of Range Systems, a product line of General Dynamics, for more than 30 years. In April of 1986, General Dynamics sold the Range Systems line to Amex Systems, Inc., a subsidiary of Allied-Signals, Inc. At the time of the sale, executives of both General Dynamics and Amex told Olson and other Range Systems employees that they would be offered jobs at Amex, and General Dynamics promised Amex that it would not attempt to rehire any of these employees for a two-year period following the sale. Olson's claim against General Dynamics was based on the following statement made by Amex's president to the Range Systems employees:

> I commit to you that in no way will you be injured. On the bottom line, you will be equal or better to [sic] your present position.

Ibid. at 1419. Olson accepted a job with Amex in April 1986. In January, 1988, Amex sold the Range Systems product line to SAIC, where Olson worked until his retirement in June, 1988. Subsequently, Olson filed suit claiming that his retirement benefits with SAIC were less than he would have received had he retired with General Dynamics, and thus misrepresentations were made to him. The district court dismissed Olson's fraud claim on

the grounds that it was preempted by ERISA, and Olson appealed.

Affirming the trial court's ruling, the Ninth Circuit Court of Appeals stated:

> Given the Supreme Court's directive that ERISA's preemption provision is to be construed broadly, it is difficult to see how Olson's fraud claim could be found not to "relate to" an employee benefit plan. We think that the district court conclusion that Olson's allegations "relate to" an employee benefit plan are a straightforward application of the standards established by the Supreme Court. To state his claim in the most favorable manner, Olson is alleging that, upon retirement, he received benefits from Amex and SAIC that were "considerably less" than the benefits General Dynamics and Amex led him to believe he would receive. The district court ruled that this is a claim "that he should be receiving a level of benefits which he is not." Concluding that such a claim "has a connection with" and makes "reference to" a benefit plan, the judge ruled that the state law fraud claim was preempted by ERISA.

Ibid. at 1419.

Finally, there are numerous other cases similar to the case at bar where the circuit courts of appeals have found that state law claims are preempted by ERISA. *See Christopher v. Mobil Oil Corp., supra; Bartholet v. Reishauer A.G.*, 953 F.2d 1073 (7th Cir. 1992); *Tingey v. Pixley-Richards West, Inc., supra* (10 state law causes of action preempted); *Felton v. Unisource Corp.*, 940 F.2d 503 (9th Cir. 1991) (state law wrongful termination claim preempted); *Lea v. Republic Airlines, Inc.*, 903 F.2d 624 (9th Cir. 1990) (state law negligence, fraud and contracts claim preempted); *Lee v. E.I. Dupont, supra* (state law fraud and negligent misrepresentation claim preempted; also questions the continuing validity of *Scott v. Gulf Oil Corp.*,

supra, in light of recent Supreme Court decisions); *Cefalu v. B.F. Goodrich Co.*, 871 F.2d 1290 (5th Cir. 1989) (state law breach of contract claim preempted); *Sejman v. Warner-Lambert Co., Inc.*, 845 F.2d 66 (4th Cir. 1988); *Belasco v. W.K.P. Wilson & Sons, Inc.*, 833 F.2d 277 (11th Cir. 1987); and *Howard v. Parisian, Inc., supra.*

In short, and contrary to petitioners' contentions, the decision of the Supreme Court for the State of Washington in this case is fully supported by the decisions of the Court and the various circuit courts of appeal.

V. CONCLUSION

For the reasons stated herein, the Petition for Writ of Certiorari should be denied.

DATED this 2nd day of June, 1995.

Phillips Petroleum Company

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APPENDIX

SUPERIOR COURT, STATE OF WASHINGTON,
COUNTY OF SPOKANE

ALVIN B. CUTLER and JOYCE P. CUTLER, a marital community; MARGARET E. CARRIERES and JOHN N. CARRIERES, a marital community; BILL E. DAISS and MARJOE DAISS, a marital community; LARRY O. GUST, a single person; KENNETH M. JANSEN and MARGARET V. JANSEN, a marital community; and MARVIN PAUL and JANICE PAUL, a marital community, Plaintiffs, v. PHILLIPS PETROLEUM COMPANY, a foreign corporation, Defendants.	No. 89200798-8 COMPLAINT FOR DAMAGES

Plaintiffs, by and through their undersigned attorneys, and for their Complaint and claims against defendant Phillips Petroleum Company, state the following, which shall be part of and applicable to all counts herein:

PARTIES

I.

At all times relevant hereto, plaintiffs Alvin Cutler, Margaret Carrieres, Bill Daiss, Larry Gust, Kenneth Jansen, and Marvin Paul were employed by defendant Phillips

Petroleum Company and based in Spokane, Washington. Presently, plaintiffs Carrieres, Cutler, Daiss, and Paul are residents of Spokane County, Washington. Plaintiff Kenneth Jansen is currently a resident of Walla Walla County, Washington, and plaintiff Larry Gust is presently a resident of Idaho Falls, Idaho.

II.

At all times relevant hereto, defendant Phillips Petroleum Company is and was a Delaware corporation with its principal place of business located in the state of Oklahoma.

JURISDICTION AND VENUE

III.

Jurisdiction of this matter is properly in this Court as the amount in controversy exceeds $10,000.00 and there is complete diversity of citizenship, 28 U.S.C. § 1332; and that this case involves the interpretation of federal statutes and laws. 28 U.S.C. § 1331.

IV.

Jurisdiction is properly in this Court concerning any claims brought pursuant to 29 U.S.C. § 1101 et seq., based upon the concurrent jurisdiction of the Courts of the United States and State Courts of competent jurisdiction, 29 U.S.C. § 1132(e)(1).

V.

Venue is properly in Spokane County. This case is not duplicative of an action pending in the Benton County Superior Court, Cause No. 88-2-00556-4.

FACTS

VI.

Prior to December 1985, the plaintiffs herein had been loyal and valued employees of defendant Phillips Petroleum Company (hereinafter referred to as "Phillips"), and most recently in defendant Phillips' fertilizer division in Spokane, Washington, as follows: Alvin B. Cutler, over 29 years of service, most recently as manager of financial services; plaintiff Margaret E. Carrieres, over 19 years of service, most recently as a business clerk; plaintiff Bill E. Daiss, over 29 years of service, most recently as Northwest Regional sales manager; plaintiff Larry O. Gust, over 26 years of service, most recently as a marketing representative; plaintiff Kenneth J. Jansen, over 31 years of service, most recently as a marketing representative; and plaintiff Marvin Paul, over 22 years of service, most recently as a marketing representative.

VII.

In December of 1985, and in light of threatened hostile takeover activity by certain investment entrepreneurs, defendant Phillips chose to financially restructure its corporate organization, in part by selling certain assets for cash, in order to liquidate debt. This included defendant Phillips' proposed sale of the Spokane division assets,

and their employees, to Cepex American of Amarillo, Texas.

VIII.

In December 1985, defendant Phillips' management team represented to the plaintiffs their benefit options with defendant Phillips and the employment and benefit options available from buyer Cepex. Defendant Phillips represented to the plaintiffs that Phillips had protected each of them by contracting with Cepex concerning salary and benefits, and assured the plaintiffs that any Phillips salary and benefits accrued would be intact without reduction for a minimum of two years after the date of sale.

IX.

Likewise, in December 1985, Phillips assured the plaintiffs that the sale of the fertilizer assets would be to a company with the financial ability and commitment to run the business for a substantial period of time. From these representations and assurances, the plaintiffs relied with the belief that Cepex would assume all benefit administration due to plaintiffs from defendant Phillips; that plaintiffs' retirement benefits as earned would stay with defendant Phillips; and that the plaintiffs would be eligible for early retirement benefits from defendant Phillips after the sale of the fertilizer assets to Cepex. Thereafter, defendant Phillips effected the sale of the fertilizer assets to Cepex on March 1, 1986.

X.

Plaintiff Jansen did request a transfer within the Phillips structure, as others were doing so and being retrained, but those requests were denied. Based upon the aforementioned representations and assurances, the other plaintiffs assented to the transfer of employment to Cepex, without request for transfer within the organizational structure of defendant Phillips. However, it soon became apparent that Cepex did not intend to continue operations of the fertilizer division.

XI.

On April 3, 1986, defendant Phillips announced a "Special Separation Program," including enhanced retirement benefits, severance pay, outplacement and housing assistance, and a "certain thrift plan," including medical and life insurance benefits. The plan provided for enhanced retirement benefits if an employee chose to separate from defendant Phillips during a "window period" from April 3, 1986, through July 1, 1986. The plan further provided that: "Employees age 55 or older during 1986 may begin monthly retirement benefits on or after May 1, 1986, or they may take the cash payment option." The special separation program further provided:

> For employees age 50 or older this year, but not yet age 62 as of July 1, 1986, a limited Social Security make-up payment will be available if benefits begin prior to age 62. If the case payment option is selected, the value of the limited Social Security make-up payment also will be paid in cash.

XII.

Based upon the previously-mentioned assurances given to plaintiffs by defendant Phillips, plaintiffs Cutler, Carrieres, Daiss, Gust, and Paul attempted to take advantage of the "special separation program" of April 3, 1986. The plaintiffs believed they were qualified to take advantage of that program due to the aforementioned representations and assurances. Those requests were denied by defendant Phillips. The plaintiffs Cutler, Carrieres, Daiss, Gust, and Paul were told they were not Phillips "employees" on April 3, 1986. Plaintiff Jansen remained employed beyond the "window period," and was then retired by Phillips without choice and without an opportunity to take advantage of the April 3, 1986, program.

XIII.

Any attempts by plaintiffs to stay with Phillips had been denied, while employees of higher rank in the Phillips' fertilizer division had been allowed to stay on long enough to take advantage of the "special separation program." These higher ranking employees knew of the special program or its possibility prior to March 1, 1986, yet failed to disclose its existence to any of the plaintiffs.

XIV.

By offering the early retirement programs, selling employees as assets, and by refusing to allow certain employees, including the plaintiffs, any opportunity to take advantage of the early retirement program, defendant Phillips received a windfall from its retirement or

pension trust, which was thereafter used to reduce defendant Phillips' outstanding debt.

FIRST CAUSE OF ACTION –
BREACH OF FIDUCIARY DUTY

Plaintiffs reallege paragraphs I through XIV as if fully set forth herein.

XV.

Based upon the foregoing acts and/or omissions of defendant Phillips, defendant Phillips has unlawfully interfered with plaintiffs' rights as participants in the "special separation program" of April 3, 1986, which benefits the plaintiffs are entitled to recover, including costs and reasonable attorney's fees in amounts to be proved at the time of trial. 29 U.S.C. § 1101 *et seq.*; 29 U.S.C. § 1104, § 1105, § 1109, § 1132, and § 1140.

SECOND CAUSE OF ACTION –
BENEFITS UNLAWFULLY WITHHELD

Plaintiffs reallege paragraphs I through XIV as if fully set forth herein.

XVI.

Based upon the foregoing acts and/or omissions of defendant Phillips, defendant Phillips has unlawfully withheld benefits due to the plaintiffs for which plaintiffs are entitled to recover double damages, costs of suit, and reasonable attorney's fees in amounts to be proved at the time of trial. RCW 49.46.010, 49.52.050, 49.52.070.

THIRD CAUSE OF ACTION – AGE DISCRIMINATION

Plaintiffs reallege paragraphs I through XIV as if fully set forth herein.

XVII.

Based upon the foregoing acts and/or omissions of defendant Phillips, defendant Phillips is liable for the wrongful discharge of the plaintiffs because of the plaintiffs' respective ages, all of which fall within the statutorily protected age group, RCW 49.60.205. Plaintiffs are thereby entitled to recover damages, costs of suit, and reasonable attorney's fees in amounts to be proved at the time of trial. RCW 49.60.010 et seq., 49.60.180.

XVIII.

Plaintiffs' cause of action for age discrimination, provided in 29 U.S.C. § 621 et seq., will be added by amendment of this Complaint after the expiration of sixty (60) days of notification to the Equal Employment Opportunity Commission. 29 U.S.C. § 626.

FOURTH CAUSE OF ACTION – NEGLIGENCE

Plaintiffs reallege paragraphs I through XIV as if fully set forth herein.

XIX.

Defendant Phillips, by its acts and/or omissions, breached a duty of care owed to each plaintiff. The

aforesaid negligence was the proximate cause of damages to each plaintiff, which damages will be proved at the time of trial.

FIFTH CAUSE OF ACTION – BREACH OF CONTRACT

Plaintiffs reallege paragraphs I through XIV as if fully set forth herein.

XX.

The affirmative conduct and action of defendant Phillips, including its meetings with plaintiffs and assurances regarding benefits given to plaintiffs, constituted a valid and enforceable contract in one or more of the following forms:

1. There existed a valid and enforceable express contract between plaintiffs and defendant Phillips, the breach of which has damaged plaintiffs in amounts to be proved at the time of trial.

2. There existed a valid and enforceable oral contract between plaintiffs and defendant Phillips, breach of which has damaged plaintiffs in amounts to be proved at the time of trial.

3. There existed between plaintiffs and defendant Phillips a valid and enforceable implied contract, which contract was made according to the assurances and ordinary course of dealing of defendant Phillips under similar circumstances. Defendant's breach of said contract has damaged plaintiffs in amounts to be proved at the time of trial.

SIXTH CAUSE OF ACTION – FRAUD

Plaintiffs reallege paragraphs I through XIV as if fully set forth herein.

XXI.

The affirmative conduct and actions of defendant Phillips, throughout the discussions of asset transfer between defendant and plaintiffs, constituted actionable fraud in that defendant Phillips made material representations of existing fact which were false, either knowingly or in ignorance of the truth, with the intent that the representations be acted upon by the plaintiffs, and that plaintiffs did rightfully rely on those representations in ignorance of their falsity to their damage.

SEVENTH CAUSE OF ACTION – OUTRAGE

Plaintiffs reallege paragraphs I through XIV as if fully set forth herein.

XXII.

Plaintiffs allege that the conduct of defendant Phillips, and its agents, was willful, wanton, intentional, and outrageous, and as a result thereof, caused damage to the plaintiffs, and each of them, including, but not limited to, mental anguish and emotional distress.

EIGHTH CAUSE OF ACTION – NEGLIGENT MISREPRESENTATION

Plaintiffs reallege paragraphs I through XIV as if fully set forth herein.

XXIII.

The aforesaid acts and/or omissions of defendant Phillips, and other acts of defendant Phillips, constitute negligent misrepresentations, the proximate cause of which damaged plaintiffs. Defendant made representations of existing facts which were false, negligently made, believed by the defendant speakers to be true, but the plaintiffs were unaware of the falsity thereof. Plaintiffs relied, as they had the right to rely, upon those statements, and the reliance upon those statements was a proximate cause of their damage.

DAMAGES.

XXIV.

The following damages suffered by plaintiffs as a proximate result of defendant's breach of fiduciary duty, negligence, breach of contract, fraud, outrage, negligent misrepresentation, and violation of statute, including RCW 19.86 et seq., and all other possible causes of action for the purposes of this Complaint include, but are not limited to:

1. Frustration of retirement benefits due to plaintiffs and wrongfully denied by defendant Phillips;

2. Expenses and monetary losses in detrimental reliance;

3. Loss of earning capacity, past and future, and/or loss of business and personal profit, past and future;

4. Mental anguish and emotional distress, and damage to the plaintiffs' respective marital communities;

5. Other compensatory, incidental, and consequential damages which are deemed just and equitable.

WHEREFORE, plaintiffs, and each of them, pray for judgment against the defendant and that plaintiffs be awarded:

1. General damages suffered by plaintiffs, and each of them, including double damages as allowed by law, in amounts to be proved at the time of trial;

2. Special damages suffered by plaintiffs, including double damages as allowed by law, and each of them, in amounts to be proved at the time of trial;

3. Costs of litigation, reasonable attorney's fees as allowed by law, and prejudgment interest on the amounts due each and every plaintiff; and

4. For such other and further relief as the Court deems just and proper.

DATED this **27th** day of February, 1989.

FELTMAN, GEBHARDT, EYMANN
& JONES, P.S.

By /s/ Richard C. Eymann
RICHARD E. EYMANN
Attorneys for Plaintiffs

SUPERIOR COURT, STATE OF WASHINGTON,
COUNTY OF SPOKANE

ALVIN B. CUTLER and JOYCE P. CUTLER, a marital community; MARGARET E. CARRIERES and JOHN N. CARRIERES, a marital community; BILL E. DAISS and MARJOE DAISS, a marital community; LARRY O. GUST, a single person; KENNETH M. JANSEN and MARGARET V. JANSEN, a marital community; and MARVIN PAUL and JANICE PAUL, a marital community, Plaintiffs, v. PHILLIPS PETROLEUM COMPANY, a foreign corporation, Defendants.	No. 89200798-8 FIRST AMENDED COMPLAINT FOR DAMAGES

Plaintiffs, by and through their undersigned attorneys, and for their Complaint and claims against defendant Phillips Petroleum Company, state the following, which shall be part of and applicable to all counts herein:

PARTIES

I.

At all times relevant hereto, plaintiffs Alvin Cutler, Margaret Carrieres, Bill Daiss, Larry Gust, Kenneth Jansen, and Marvin Paul were employed by defendant Phillips

Petroleum Company and based in Spokane, Washington. Presently, plaintiffs Carrieres, Cutler, Daiss, and Paul are residents of Spokane County, Washington. Plaintiff Kenneth Jansen is currently a resident of Walla Walla County, Washington, and plaintiff Larry Gust is presently a resident of Idaho Falls, Idaho.

II.

Plaintiffs Davis, Lindberg, Koontz, Hoffarth, Allen, and Hoover were employed by defendant Phillips Petroleum Company at defendant's facilities nearly Finley, Washington, and previously filed suit for their claims against defendant Phillips in the matter *Jansen, et al. v. Phillips Petroleum Co.*, Benton County Superior Court Cause No. 88-2-00556-4. That case was transferred to the Spokane County Superior Court by Order dated June 19, 1990, and was consolidated with Spokane County Superior Court Cause No. 89-2-00738-8 by Order dated October 4, 1990.

III.

At all times relevant hereto, defendant Phillips Petroleum Company is and was a Delaware corporation with its principal place of business located in the state of Oklahoma.

JURISDICTION AND VENUE

IV.

Jurisdiction of this matter is properly in this Court as the amount in controversy exceeds $10,000.00 and there is

complete diversity of citizenship, 28 U.S.C. § 1332; and that this case involves the interpretation of federal statutes and laws. 28 U.S.C. § 1331.

V.

Jurisdiction is properly in this Court concerning any claims brought pursuant to 29 U.S.C. § 1101, et seq., based upon the concurrent jurisdiction of the Courts of the United States and State Courts of competent jurisdiction, 29 U.S.C. § 1132(e)(1).

VI.

Venue is properly in Spokane County.

FACTS

VII.

Prior to December 1985, the plaintiffs herein had been loyal and valued employees of defendant Phillips Petroleum Company (hereinafter referred to as "Phillips"), and most recently in defendant Phillips' fertilizer and chemical divisions in Finley and Spokane, Washington, as follows: Alvin B. Cutler, over 29 years of service, most recently as manager of financial services plaintiff Margaret E. Carrieres, over 19 years of service, most recently as a business clerk plaintiff Bill E. Daiss, over 29 years of service, most recently as Northwest Regional sales manager: plaintiff Larry O. Gust, over 26 years of service, most recently as a marketing representative; plaintiff Kenneth J. Jansen, over 31 years of service, most recently as a marketing representative: plaintiff Marvin Paul, over

22 years of service, most recently as a marketing representative.

Plaintiffs Richard A. Davis, Fred Lindberg, Jerry Koontz, David L. Hoffarth, Richard G. Allen, and Susan R. Hoover, also each had performed several years of service to the defendant while in its employ.

VIII.

In December of 1985, and in light of threatened hostile takeover activity by certain investment entrepreneurs, defendant Phillips chose to financially restructure its corporate organization, in part by selling certain assets for cash, in order to liquidate debt. This included defendant Phillips' proposed sale of the Spokane and Finley division assets, and their employees, to Cepex American of Amarillo, Texas.

IX.

In December 1985, defendant Phillips' management team represented to the plaintiffs their benefit options with defendant Phillips and the employment and benefit options available from buyer Cepex. Defendant Phillips represented to the plaintiffs that Phillips had protected each of them by contracting or otherwise agreeing with Cepex concerning salary and benefits, and assured the plaintiffs that any Phillips salary and-benefits accrued by the plaintiffs with Phillips would be intact without reduction for a minimum of two years after the date of sale to Cepex without reduction or elimination.

X.

Likewise, in December 1985, defendant Phillips assured the plaintiffs that the sale of the fertilizer assets would be to a company with the financial ability and commitment to run the business for a substantial period of time. The plaintiffs relied upon these actions, representations, and assurances, with the belief that Cepex would assume all benefit administration due to the plaintiffs from defendant Phillips; that plaintiffs' retirement benefits as earned would stay with defendant Phillips and that the plaintiffs would be eligible for early retirement benefits from defendant Phillips after the sale of the fertilizer assets to Cepex. Thereafter, defendant Phillips effected the sale of the fertilizer assets to Cepex on March 1, 1986.

XI.

Plaintiff Jansen did request a transfer within the Phillips structure, as others were doing so and being retrained, but his requests were denied. Based upon the aforementioned representations and assurances, the other plaintiffs assented to the transfer of employment to Cepex, without request for transfer within the organizational structure of defendant Phillips, and without seeking employment elsewhere. However, it soon became apparent that Cepex did not intend to continue operation of the fertilizer division.

XII.

On April 3, 1986, defendant Phillips announced a "Special Separation Program," including enhanced retirement benefits, severance pay, outplacement and housing assistance, and a "certain thrift plan," including medical and life insurance benefits. The program provided for enhanced retirement benefits if an employee chose to separate from defendant Phillips during a "window period" from April 3, 1986, through July 1, 1986. The program further provided that: "Employees age 55 or older during 1986 may begin monthly retirement benefits on or after May 1, 1986, or they may take the cash payment option." The Special Separation Program further provided:

> For employees age 50 or older this year, but not yet age 62 as of July 1, 1986, a limited Social Security make-up payment will be available if benefits begin prior to age 62. If the cash payment option is selected, the value of the limited Social Security make-up payment also will be paid in cash.

XIII.

Based upon the previously-mentioned assurances given to plaintiffs by defendant Phillips, plaintiffs Cutler, Carrieres, Daiss, Gust, and Paul attempted to take advantage of the "Special Separation Program" of April 3, 1986. The plaintiffs believed they were qualified to take advantage of that program due to the aforementioned representations and assurances. Those requests were denied by defendant Phillips. These plaintiffs were told they were not Phillips "employees" on April 3, 1986. Plaintiff Jansen

remained employed beyond the "window period," and was then retired by Phillips without choice and without an opportunity to take advantage of the April 3, 1986, program. The remaining plaintiffs continued to toil with Cepex.

XIV.

Any attempts by plaintiffs to stay with Phillips had been denied, and they were vigorously encouraged by defendant to follow the transfer of assets to Cepex, while employees of higher rank in the Phillips' fertilizer division had been allowed to stay on long enough to take advantage of the "Special Separation Program." These higher ranking employees knew of the special program or its possibility prior to March 1, 1986, yet failed to disclose its existence to any of the plaintiffs.

XV.

Notwithstanding the representations made by defendant Phillips' representatives, upon which each plaintiff relied, on or about December 26, 1986, each plaintiff was laid off or otherwise separated from gainful employment with Cepex, contrary to the assurances and representations made by defendant Phillips.

XVI.

By offering the early retirement programs, selling employees as assets, and by refusing to allow employees, including certain of the plaintiffs, any opportunity to take advantage of the early retirement program, defendant

Phillips received a windfall from its retirement or pension trust, which was thereafter used to reduce defendant Phillips' outstanding debt and to fight off any hostile takeover bid.

FIRST CAUSE OF ACTION – BENEFITS UNLAWFULLY WITHHELD ALL PLAINTIFFS

Plaintiffs reallege paragraphs I through XVI as if fully set forth herein.

XVII.

Based upon the foregoing acts and/or omissions of defendant Phillips, defendant Phillips has unlawfully withheld benefits due to the plaintiffs for which plaintiffs are entitled to recover double damages, costs of suit, and reasonable attorney's fees in amounts to be proved at the time of trial. RCW 49.46.010, 49.52.050, 49.52.070.

SECOND CAUSE OF ACTION – NEGLIGENCE – ALL PLAINTIFFS

Plaintiffs reallege paragraphs I through XVI as if fully set forth herein.

XVIII.

Defendant Phillips, by its acts and/or omissions, breached a duty of care owed to each plaintiff. The aforesaid negligence was the proximate cause of damages to each plaintiff, which damages will be proved at the time of trial.

THIRD CAUSE OF ACTION – BREACH OF CONTRACT – ALL PLAINTIFFS

Plaintiffs reallege paragraphs I through XVI as if fully set forth herein.

XIX.

The affirmative conduct and action of defendant Phillips, including its meetings with plaintiffs and assurances regarding benefits given to plaintiffs, constituted a valid and enforceable contract in one or more of the following forms:

1. There existed a valid and enforceable express contract between plaintiffs and defendant Phillips, the breach of which has damaged plaintiffs in amounts to be proved at the time of trial.

2. There existed a valid and enforceable oral contract between plaintiffs and defendant Phillips, the breach of which has damaged plaintiffs in amounts to be proved at the time of trial.

3. There existed between plaintiffs and defendant Phillips a valid and enforceable implied contract, which contract was made according to the assurances and ordinary course of dealing of defendant Phillips under similar circumstances. Defendant's breach of said contract has damaged plaintiffs in amounts to be proved at the time of trial.

FOURTH CAUSE OF ACTION – FRAUD – ALL PLAINTIFFS

Plaintiffs reallege paragraphs I through XVI as if fully set forth herein.

XX.

The affirmative conduct and actions of defendant Phillips, throughout the discussions of asset transfer between defendant and plaintiffs, constituted actionable fraud in that defendant Phillips made material representations of existing fact which were false, either knowingly or in ignorance of the truth, with the intent that the representations be acted upon by the plaintiffs, and that plaintiffs did rightfully rely on those representations in ignorance of their falsity to their respective damage, in amounts to be proved at the time of trial.

FIFTH CAUSE OF ACTION – NEGLIGENT MISREPRESENTATION – ALL PLAINTIFFS

Plaintiffs reallege paragraphs I through XVI as if fully set forth herein.

XXI.

The aforesaid acts and/or omissions of defendant Phillips, and other acts of defendant Phillips, constitute negligent misrepresentations, the proximate cause of which damaged plaintiffs. Defendant made representations of existing fact which were false, negligently made, and believed by the defendant speakers to be true, but the plaintiffs were unaware of the falsity thereof. Plaintiffs relied, as they had the right to rely, upon those

statements, and the reliance upon those statements was a proximate cause of their respective damage, in amounts to be proved at the time of trial.

SIXTH CAUSE OF ACTION - OUTRAGE - ALL PLAINTIFFS

Plaintiffs reallege paragraphs I through XVI as if fully set forth herein.

XXII.

Plaintiffs allege that the conduct of defendant Phillips and its agents was willful, wanton, intentional, and outrageous, and as a result thereof, caused damage to the plaintiffs, and each of them, including but not limited to mental anguish and emotional distress.

SEVENTH CAUSE OF ACTION - BREACH OF FIDUCIARY DUTY - PLAINTIFFS CUTLER, CARRIERES, DAISS, GUST, JANSEN and PAUL

Plaintiffs reallege paragraphs I through XVI as if fully set forth herein.

XXIII.

Based upon the foregoing acts and/or omissions of defendant Phillips, defendant Phillips has unlawfully interfered with plaintiffs' rights as participants in the "Special Separation Program" of April 3, 1986, which benefits the plaintiffs are entitled to recover, including costs and reasonable attorney's fees in amounts to be

proved at the time of trial. 29 U.S.C. § 1101 et seq.: 29 U.S.C. § 1104, § 1105, § 1109, § 1132, and § 1140.

EIGHTH CAUSE OF ACTION – AGE DISCRIMINATION – PLAINTIFFS CUTLER, CARRIERES, DAISS, GUST, JANSEN and PAUL

Plaintiffs reallege paragraphs I through XVI as if fully set forth herein.

XXIV.

Based upon the foregoing acts and/or omissions of defendant Phillips, defendant Phillips is liable for the wrongful discharge of the plaintiffs because of the plaintiffs' respective ages, all of which fall within the statutorily protected age group, RCW 49.60.205. Plaintiffs are thereby entitled to recover damages, costs of suit, and reasonable attorney's fees in amounts to be proved at the time of trial. RCW 49.60.010 et seq., 49.60.180.

XXV.

Plaintiffs' cause of action for age discrimination, provided in 29 U.S.C. § 621 et seq., will be added by amendment of this Complaint after the expiration of sixty (60) days of notification to the Equal Employment Opportunity Commission. 29 U.S.C. § 626. Plaintiff Jansen had previously filed a Complaint alleging age discrimination under 29 U.S.C. § 621 et seq., in *Jansen v. Phillips Petroleum Co. and Phillips Chemical Co.*, United States District Court for the Eastern District of Washington, Cause No

C-87-779-AAM, which was dismissed by that Court without prejudice on September 5, 1989, at defendant Phillips' request, as that Court found plaintiff Jansen's lawsuit therein was "substantially identical" to this Spokane County Superior Court action. Plaintiff Jansen cannot be prejudiced thereby.

DAMAGES

XXVI.

The following damages suffered by plaintiffs as a proximate result of defendant's breach of fiduciary duty, negligence, breach of contract, fraud, outrage, negligent misrepresentation, and violation of statute, including RCW 19.86 et seq., and all other possible causes of action for the purposes of this Complaint include, but are not limited to:

1. Frustration of retirement and other benefits due to plaintiffs and wrongfully denied or withheld by defendant Phillips;

2. Expenses and monetary losses in detrimental reliance;

3. Loss of earnings and earning capacity, past and future, and/or loss of business and personal profit, past and future;

4. Mental anguish and emotional distress, and damage to the plaintiffs' respective marital communities and relationships;

5. Other compensatory, incidental, and consequential damages which are deemed just and equitable.

WHEREFORE, plaintiffs, and each of them, pray for judgment against the defendant and that plaintiffs be awarded:

1. General damages suffered by plaintiffs, and each of them, including double damages as allowed by law, in amounts to be proved at the time of trial;

2. Special damages suffered by plaintiffs, and each of them, including double damages as allowed by law, in amounts to be proved at the time of trial;

3. Costs of litigation and reasonable attorney's fees as allowed by law, and prejudgment interest on the amounts due each and every plaintiff and

4. For such other and further relief as the Court deems just and proper.

DATED this 12th day of March, 1989.

FELTMAN, GEBHARDT, EYMANN
& JONES, P.S.

By /s/ Richard C. Eymann
RICHARD E. EYMANN,
WSBA #7470
PATRICK M. RISKEN, WSBA
#14632
Attorneys for Plaintiffs